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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA

Plaintiff,

vs.

ROBERT JACOBSEN,

Defendant

Case No.: CR-15-00518-MMC

**REPLY BRIEF IN SUPPORT OF
SECTION 2255 PETITION**

INTRODUCTION

The Government's opposition to Jacobsen's § 2255 petition comes down to two points—his plea agreement blocks the petition, and his plea agreement undermines any claim of actual innocence. However, the plea agreement should not bar an actual innocence claim, and his arguments about the validity of the deeds of trust are issues of law. Thus, they do not depend on his plea statements.

ARGUMENT**I. The plea agreement cannot waive an actual innocence claim.**

The Government begins its argument with the plea agreement. Government brief, at pages 12-13. It contends that Jacobsen gave up his right to claim actual innocence. *Ibid.*

It is an open question whether an actual innocence claim can overcome a guilty plea. The Government cites *United States v. Jaquez-Diaz*, 2008 U.S. Dist. LEXIS 124601 (D. Ariz. Nov. 26, 2008), to support its argument the plea bars the claim. Government brief, at page 13. The court in *Jaquez-Diaz* mentioned an actual innocence claim only once, and that claim played no part in its decision. *United States v. Jaquez-Diaz*, 2008 U.S. Dist. LEXIS 124601, at ** 2-4. Rather, the court focused on whether the plea was knowing and voluntary. *Ibid.* It also did not consider the constitutional problems it might face if it held a plea waived any actual innocence claim. *Ibid.*

So, no case the Government cites squarely holds that a plea bars an actual innocence claim. The "actual innocence" rule exists to make sure innocent defendants are not punished for crimes they did not commit. *Bousley v. United States*, 523 U.S. 614, 620 (1998), citing *Teague v. Lane*, 489 U.S. 288, 312 (1989): "[O]ne of the 'principal functions of habeas corpus [is] to assure that no man has been incarcerated under a procedure which creates an impermissible large risk that the innocent will be convicted.' An actual innocence claim, if proven, must allow a defendant to overcome a plea.

1 The Government helpfully notes that Jacobsen's plea did not apply to claims
2 for ineffective assistance of counsel. Government brief, at pages 12-13. Jacobsen
3 makes such claims in his § 2255 petition. See Ground VI, at ¶¶ 86-90 of the petition.

4 **II. Jacobsen did not commit a procedural default in his appeal.**

5 Next, the Government insists Jacobsen cannot raise his actual innocence or
6 other claims because he did not bring them up in his direct appeal. Government brief,
7 at pages 14-15: "Because defendant could have appealed the district court's rejection
8 of his argument that the deeds were void and that invalidated his guilty pleas, and
9 did not, his claims that rely on this argument are procedurally defaulted."
10 Government brief, at page 14: 24-25, page 15: 1.

11 The Government wants the Court to ignore its position in the direct appeal—
12 Jacobsen had no right to an appeal because he waived it in his plea agreement. See
13 United States v. Jacobsen, opinion of the Ninth Circuit, case no. 18-10335, at page 2
14 (9th Cir. March 11, 2020). The Ninth Circuit agreed with the Government and
15 dismissed the direct appeal. *Ibid.* Now, the Government insists Jacobsen should have
16 raised the void deed issue in the direct appeal when, according to the Government,
17 he had no right to an appeal. Government brief, at pages 14-15. There is a word for
18 such contradictory positions—estoppel. The Government cannot fault Jacobsen for the
19 issues he presented in his appeal when it successfully contended, he had no right to
20 appeal. Therefore, this Court should hold Jacobsen did not commit a procedural
21 default by not challenging the deeds on appeal.
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III. The Government had to prove fraudulent intent.

Wisely, the Government recognizes that money laundering and wire fraud are specific intent crimes. Government brief, at pages 16-17. The required intent is an intent to defraud or cheat: "Here, the government was required to prove the defendant knew the laundered funds were derived from wire fraud." *United States v. Turman*, 122 F.3d 1167, 1169 (9th Cir. 1997); *United States v. Stein*, 37 F.3d 1407, 1410 (9th Cir. 1994). The Government had to prove Jacobsen knew the laundered funds came from fraud. *Ibid*.

As for wire fraud, "[We] therefore overrule our prior cases on this question and hold that wire fraud requires the intent to deceive *and* cheat—in other words, to deprive the victim of money or property by means of deception." *United States v. Miller*, 953 F.3d 1095, 1103 (9th Cir. 2020) (italics in original).

The petition alleges that Jacobsen did not create the supposed "scheme" involving the invalid deeds of trust. Instead, he relied on his attorneys, specifically the Yesk law firm, to advise him. Petition, at ¶ 21. It advised him the deeds of trust were void because they made a non-existent entity the beneficiary. *Ibid*. They also told him he could sue to challenge those deeds. *Ibid*. He relied on that advice. He had no reason to suspect the advice was unsound. *Ibid*. By relying on competent advice from competent lawyers, he lacked any fraudulent intent. Instead, he believed he was acting legally because his lawyers told him so.

The advice of counsel destroys the intent needed to prove wire fraud or money laundering. *United States v. Miller*, 953 F.3d at 1103; *United States v. Turman*, 122

1 F.3d at 1169. This lack of intent proves actual innocence because Jacobsen could not
2 have been convicted without fraudulent intent.

3 It also shows ineffective counsel. His trial counsel should have called members
4 of the Yesk firm to testify at trial on their role. They would have said that they
5 advised Jacobsen the deeds were void, and he, therefore, had proper grounds to attack
6 them.

7 The Government argues that Jacobsen's statements in his plea prove his
8 fraudulent intent. Government brief, at pages 15-16. But, as set out in the petition,
9 the deeds were void as a matter of law. They came from an entity that did not exist,
10 that had no power to contract. A void deed of trust can have no legal effect. *Yvanova*
11 *v. New Century Mortgage Corp.*, 62 Cal.4th 919, 927-928 (2016). "Such a contract has
12 no existence whatever. It has no legal entity for any purpose and neither action nor
13 inaction of a party to it can validate it' (*Colby v. Title Ins. and Trust Co.* (1911)
14 160 Cal. 632, 644. As we said of a fraudulent real property transfer in *First Nat. Bank*
15 *of L. A. v. Maxwell* (1899) 123 Cal. 360, 371 [55 P. 980], 'A void thing is as no thing.'
16 *Id.*, at 929.

17 The validity of the deeds did not depend on Jacobsen's admissions. They were
18 void under California law, no matter what Jacobsen said in his plea agreement. The
19 Government often talks about irrelevant arguments. See, e.g., page 16 of the
20 Government brief. But Jacobsen's admissions were irrelevant because they did not
21 decide if the deeds were void.

22 Finally, Jacobsen's sentence was based on the alleged losses title companies
23 sustained. The restitution amount depended on the losses as well. The title companies
24

1 sustained losses only because they believed the deeds were valid. But, if they deeds
2 were void, they had no true losses. Jacobsen's sentence and the restitution amount
3 should have been reduced.

4 **IV. Jacobsen has stated a claim for ineffective assistance of counsel.**

5 Under *Strickland v. Washington*, 466 U.S. 668, 687 (1984), a defendant
6 claiming ineffective assistance of counsel has this burden of proof: "First, the
7 defendant must show that counsel's performance was deficient. This requires
8 showing that counsel made errors so serious that counsel was not functioning as the
9 "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant
10 must show that the deficient performance prejudiced the defense. This requires
11 showing that counsel's errors were so serious as to deprive the defendant of a fair
12 trial, a trial whose result is reliable."

13 Jacobsen has established his trial counsel's performance was ineffective. As a
14 matter of law, the deeds of trust on the San Francisco, Danville, and Monterey
15 properties were void because they were issued by an entity that did not exist. This
16 conclusion, as the petition shows, is a matter of common sense and California law.
17 See petition, at ¶¶ 56-75. It is equally evident that the Government could not prove
18 wire fraud or money laundering without showing the deeds were valid. If the deeds
19 were void, Jacobsen had every reason to believe he could challenge them. He would
20 have no fraudulent intent, as required by the statutes. *United States v. Miller*, 953
21 F.3d at 1102-1103.

22 Jacobsen's trial counsel raised the void deed issue at the sentencing hearing,
23 but he should have done far more. He should have counseled his client not to accept

1 a guilty plea when the client lacked the required state of mind. He could have
2 consulted with an expert on California mortgage law, as the void deed issue was
3 crucial to Jacobsen's defense. He could have called that expert as a witness but did
4 not. He could have briefed the issue and asked for a hearing to argue it. His actions
5 prejudiced Jacobsen because it deprived him of his best defense against the charges—
6 the fact the deeds were void, and he thus lacked criminal intent.

7 In addition, trial counsel should not have advised Jacobsen to take a plea that
8 waived his right to appeal. In his appeal, he could have mentioned the state of mind
9 and void deed defenses, but the plea bargain blocked him. These were compelling
10 defenses that showed Jacobsen committed neither money laundering nor wire fraud.

11 CONCLUSION

12 Again, Jacobsen had strong defenses to the wire fraud and money laundering
13 charges. Under California law, the deeds of trust were void. And, he was relying on
14 legal advice, which takes away any criminal intent.

15 For these reasons, defendant Robert Jacobsen respectfully requests that the
16 Court set an evidentiary hearing on the § 2255 petition and, after that hearing, issue
17 the writ as prayed.

18 Dated: October 8, 2021

LAW OFFICE OF
RICHARD L. ANTOGNINI

20 By: /s/ Richard L. Antognini
21 Richard L. Antognini
22 Attorneys for Defendant
23 ROBERT JACOBSEN

CERTIFICATE OF SERVICE

I certify that I electronically filed the preceding Reply Brief in Support of § 2255 petition with the Clerk of the Court for the United States District Court for the Northern District of California by using the District Court's CM/ECF system on October 8, 2021.

I certify that all participants are registered CM/ECF users, and that service of all the above documents will be accomplished by the District Court CM/ECF system.

Dated: October 8, 2021

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